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No. 89-1532

In The

# Supreme Court of the United States

October Term, 1989

FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, PAA CHAPTER, AFL-CIO,

*Petitioner,*

-against-

PAN AMERICAN WORLD AIRWAYS, INC. and PAN AMERICAN CORPORATION,

*Respondents.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether, under the Railway Labor Act, the District Court, as affirmed by the Court of Appeals for the Second Circuit, properly dismissed a union's action to compel arbitration of a grievance for a claimed breach of a collective bargaining agreement – the failure to reassign work of a recently acquired airline's employees (not represented by the union) to employees of an affiliated airline (who are represented by the union) – where the grievance, although it does not seek the actual reassignment of work across the corporate lines of the affiliated airlines but rather damages in lieu of such reassignment, implicates a "representation" dispute within the exclusive jurisdiction of the National Mediation Board to resolve, which dispute had never been submitted to the Board.

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## RESPONDENTS' BRIEF IN OPPOSITION

## COUNTER-STATEMENT OF THE CASE

The petition of the plaintiff-petitioner union ("FEIA") seeks review of the affirmance by the Second Circuit Court of Appeals, reported at 896 F.2d 672 (2d Cir. 1990), of the dismissal of the FEIA's amended complaint by the District Court in a decision reported at 716 F.Supp. 110 (S.D.N.Y. 1989). FEIA's dispute with the defendants-respondents[1] arose out of the 1986 purchase by defendant-

[1] As indicated in this paragraph, the respondents are two related corporations: Pan American World Airways, Inc., is a

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respondent Pan Am[erican] Corp., a holding company that is not an airline, of a small independent pre-existing airline (Ransome Airlines, later renamed Pan Am Express, Inc.) and Pan Am Corp.'s decision to operate its Ransome/Pan Am Express subsidiary separately from its other airline subsidiary, defendant-respondent Pan American World Airways, Inc ("PAWA").

The FEIA is, pursuant to a certification issued by the National Mediation Board ("NMB") in 1968, the exclusive bargaining representative under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), of Operations Training Instructors (OTI's) employed by PAWA. In that representative capacity, the FEIA has had a collective bargaining agreement with PAWA (whose Article 1 Pan Am Corp. agreed to honor), by which FEIA-represented OTI's employed by PAWA were entitled to do certain training work PAWA might conduct. To use the agreement's precise language at Article 1(B) – a "scope clause" – FEIA-represented PAWA-employed OTI's "shall exclusively perform the instructional work conducted by the Company [defined in the contract's preamble as "Pan American World Airways, Inc., a New York Corporation"] requiring the Services of an Instructor in [various specified] areas." Ransome/Pan Am Express has historically done that work, and continues to do that work, with its *own* personnel (about 16 individuals), some now represented by unions other than FEIA and the rest unrepresented.

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wholly owned subsidiary of Pan Am Corp., referred to in the caption as "Pan American Corp."

Because the FEIA wanted that Ransome "work" or, rather, money for having its members not do that work, the FEIA filed a grievance claiming, in its amended form, that PAWA and Pan Am Corp. were violating the PAWA-FEIA agreement's "scope clause" by not giving Ransome/Pan Am Express training work to OTI's represented by the FEIA. In the amended grievance, FEIA said that it had

> decided not to seek to require Pan Am Corporation to cause Ransome/Pan Am Express to distribute the work of training its [*i.e.*, Ransome's] employees in accord with Article 1 of the collective bargaining agreement.
>
> We now allege, in accord with the balance of the [original] grievance, that Pan Am Corporation and Pan American World Airways, Inc., have violated and are continuing to violate Article 1(B) of the Agreement by failing to employ OTI's to train Ransome personnel in accord with Article 1(B). As a remedy we ask that Pan Am Corporation be found to have violated Article 1(B) of the contract, and that OTI's found to have lost work as a result of the violation be compensated for that loss.

PAWA refused to arbitrate that amended grievance before a panel called an "adjustment board" because the grievance involved, in PAWA's view, a representation issue within the exclusive jurisdiction of the National Mediation Board under the RLA's Section 2, Ninth (45 U.S.C. § 152, Ninth), and that representation issue had *not* been presented to that Board. This action sought to compel that arbitration without the NMB's having been asked to resolve any aspect of the dispute.

The District Court dismissed the action for lack of subject matter jurisdiction, reasoning that because the grievance *involved* a representation question – *e.g.*, whether the NMB-issued certification issued to a union so it may represent *one* carrier's employees should be interpreted to cover the employees of a newly affiliated carrier, or whether two newly affiliated carriers should be treated as a "single carrier" for representation purposes, or what is the effect on a union's representation rights (and contract) when the carrier its contract is with becomes involved in an acquisition of, or affiliation with, another carrier having its own employees (who in turn have their own statutory representation rights and interests under the RLA) – only the *NMB* (not an arbitrator, or a court) had the jurisdiction to resolve the dispute in the first instance. The District Court further noted that for an adjustment board to award the money damages the FEIA seeks, *i.e.*, wages for work not performed, the adjustment board would *first* have to determine that the FEIA was entitled to cross the corporate boundaries of a newly acquired airline to perform Ransome's training work historically performed by Ransome's own employees, which underlying determination involves deciding a representation issue that only the NMB could resolve, and the NMB had not been presented with that issue. The Second Circuit affirmed.

## ARGUMENT

### There Is No Substantial Need To Grant The Petition

The Second Circuit recognized that the dispute the union wished to have arbitrated, while it obviously was

framed in terms of a dispute involving the interpretation of a collective bargaining agreement – which kind of dispute is often termed a "minor dispute" and is normally resolvable only by adjustment boards established under the RLA (45 U.S.C. §§ 153, 184) – *also* involved a representation issue: the FEIA's dispute

> "presents . . . factors which . . . implicate[] representation concerns within the exclusive jurisdiction of the NMB, i.e., whether the union's certification applied to the subsequently acquired Ransome subsidiary and whether the two related airlines should be treated as a single carrier for representation purposes.

896 F.2d at 673.

The fact that the FEIA's grievance did not seek the actual reassignment of work across corporate boundaries but just damages for not getting the work reassigned did not make the representational aspect of the dispute disappear:

> [A]n award of the damages sought here – or even a realistic threat of such an award – would have the same practical effect as work reassignment on settling representation issues by extinguishing the possibility of a separate Ransome bargaining unit. No company in its right mind would continue to pay twice for the same work; it would take steps to transfer the work, if it could. Thus, like the district court, we reject FEIA's characterization of the present conflict as involving solely a "minor dispute," that is, a dispute over the interpretation or application of existing collective bargaining agreements, which under § 204 of the Act, 45 U.S.C. § 184, is committed to an authorized Board of Adjustment for resolution.

> As the district court pointed out, the NMB "must have the opportunity to define how, and by whom, groups of employees in this airline merger situation are to be represented;" only after the NMB's determination "may the union and the employer, or the arbitrator, establish or interpret contractual working conditions." 716 F.Supp at 116.

896 F.2d at 673-74.

By its decision, the Second Circuit in essence said it would stay with the many Courts of Appeals that have entertained this sort of question and have decided that, in the context of an airline merger or acquisition, an otherwise justiciable (contract-interpretation) dispute involving or implicating representation questions must (at least in the first instance) be referred to the NMB for its determination of the representation question. *See*, in addition to the decision cited by the Second Circuit, *Western Airlines, Inc. v. International Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., sitting as Circuit Justice) ("The great weight of the case law supports the proposition that disputes as to the effect of collective-bargaining agreements on representation in an airline merger situation are representation disputes within the exclusive jurisdiction of the National Mediation Board), such cases as *Air Line Employees Ass'n v. Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.), *cert. denied*, 479 U.S. 962 (1986); and *International Bhd. of Teamsters v. Texas Int'l Airlines*, 717 F.2d 157 (5th Cir. 1983). *See also IBTCWHA, Local Union 2702 v. Western Air Lines*, 854 F.2d 1359 (9th Cir. 1988), *upon remand from Delta Air Lines v. International Bhd. of Teamsters*, 484 U.S. 806 (1987); *Air Line Pilots Ass'n v. Texas Int'l Airlines*, 656 F.2d 16 (2d Cir. 1981); *IUFA v. Pan American World*

*Airways, Inc.*, 664 F.Supp. 156 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988).[2]

In trying to create a possible Circuit Court conflict, FEIA points to *Association of Flight Attendants v. Delta Airlines*, 879 F.2d 906 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3625 (April 2, 1990) ("*AFA-Delta*"), as a decision that is supposedly irreconcilable with the Second Circuit's *FEIA* decision. The two decisions, while their conceptual approaches may differ, are *not* irreconcilable as the Second Circuit itself suggested below. First of all, in the *AFA-Delta* case the representational aspects of the dispute between the parties – involving, from the union's perspective, the correctness under a union contract of an airline's corporate decision to sign a particular kind of merger agreement with another airline – had, by the time the case had arrived at the Court of Appeals, been completely *resolved* (and resolved by the proper agency, the

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[2] The decisions of this Court that the FEIA's petition cites (at 8) for the proposition that work-assignment disputes between unions should be arbitrated are inapposite. As a review of those cases (*T.-C.E. Union v. Pacific R. Co.*, 385 U.S. 157 [1966]; *Slocum v. Delaware L. & W.R. Co.*, 339 U.S. 239 [1950]; and *Order of Railway Conductors v. Pitney*, 326 U.S. 561 [1946]) would show, what this Court was saying there was that work assignment disputes between unions on a *single* carrier should be arbitrated before the National Railroad Adjustment Board with all the unions invited to participate. Not only would an arbitration proceeding on the FEIA's grievance be one that the representatives of Ransome employees would *not* be invited to participate in (and could not participate in under the terms of the FEIA-PAWA contract establishing the adjustment board in this matter), but the underlying question here is precisely *whether* PAWA and Ransome make up a *single* carrier or not, which only the NMB may decide.

NMB): the NMB had issued a determination as to the effect of a certificate the NMB itself had issued to a union to be the exclusive representation of a class of employees of an airline that had since been merged into another, by which determination the NMB had decided that that union, under the RLA, should no longer represent those employees. In other words, by the time the case reached the Court of Appeals, there no longer was *any* "single carrier" or any other form of *representation issue* left to be resolved. In *FEIA*, however, the NMB had *never* been asked to do *anything*, *e.g.*, asked to clarify the FEIA's original NMB-issued certification so that it might cover operations of a related corporation, or otherwise determine that PAWA and Ransome formed, in effect, a "single carrier" (whose training employees, therefore, FEIA might come to represent by an NMB-conducted election or by some decision of the NMB applying the representational requirements of the RLA to the particular facts).[3]

Second, and perhaps more importantly, there is a critical factual difference between the *FEIA* and *AFA-*

[3] It is *not* true, contrary to the FEIA's petition's statement (at 11), that any NMB-issued certifications are extinguished automatically by operation of law. The NMB has made clear that, while it once had written words (in *Republic Airlines*, 8 NMB 49, 54-55 [1980]) some had so interpreted, nothing in fact was automatic. The *NMB*, which has developed its own special procedures for handling representation questions in the merger or acquisition context, resolves the representation/continuing-effect-of-certification questions on the basis of each case's specific circumstances. *See, e.g., Trans World Airlines/Ozark Airlines*, 14 NMB 218 (1987), clarifying *Republic*, and the NMB's "Procedures for Handling Representation Issues Resulting from Mergers, Acquisitions or Consolidations in the Airline Industry," 14 NMB 388 (1987).

*Delta* cases arising from the difference between the underlying grievances filed by the unions in these two cases. The FEIA's grievance would *require* the adjustment board arbitration panel, in order to award the requested relief of damages, *first* to make a representation determination: that the union certified by the NMB to represent *one* carrier's employees was entitled to cross at least nominal corporate boundaries and claim an affiliated carrier's work as if the two carriers were a single carrier. The union's grievance in *AFA-Delta*, however – especially by the time that case had reached the D.C. Circuit – did not require the arbitrator to make a representation decision *because the NMB had already made it* (by extinguishing the grieving union's certification to represent a class of one airline's [Western's] employees).

Beyond reliance on *AFA-Delta*, FEIA's petition reasserts related arguments raised and properly rejected below: that the sanctity of contracts and the inability of the *NMB* to enforce FEIA's contract rights in the way FEIA wants require arbitration of FEIA's amended grievance. Those arguments do not merit further review in this case. As to the sanctity of contracts argument, FEIA fails to recognize that where, as here, fundamental *statutory* representational rights are involved, what an employer and a union may have agreed to is not – and cannot be – necessarily controlling. *See, e.g., Jones v. Trans World Airways*, 495 F.2d 790, 797 (2d Cir. 1974); *Order of Railway Conductors v. Switchmen's Union of North America*, 269 F.2d 726, 731 (5th Cir. 1959); *Switchmen's Union of North America v. Southern Pacific Co.*, 253 F.2d 81 (9th Cir. 1959). Any other approach would give to a carrier and union, or (here) an arbitrator selected by the carrier and union, the

right to make, in effect, representational choices for employees despite the fact that the Railway Labor Act reserves the making of such choices, through the processes of the National Mediation Board, ultimately to the employees.[4]

That the NMB may lack the power to enforce a collective bargaining agreement is irrelevant here because, as explained above, a contract-interpretation dispute implicating a representation issue must go initially to the NMB for that Board to resolve the representation issue. The NMB could, however, do many relevant things. It could, for instance, clarify or interpret the "certification" *it* had issued to the FEIA in 1968 declaring the FEIA to be the exclusive representative of PAWA's OTI's, that is (for instance), decide whether that "certification" covers not only the "craft or class" of PAWA's OTI's but also the instructor personnel of its new sister corporation Ransome; or the NMB could be asked to determine whether PAWA and Ransome are, to use the NMB's terms, a

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[4] This critical point is intertwined with the genesis of the RLA whose provisions as to representation (*i.e.*, especially 45 U.S.C. §§ 152, Fourth and 152, Ninth) took into account the problems raised by a nominally mostly organized railroad industry in which large numbers of unions were in fact controlled in one way or another by the railroads. *See, e.g.*, Rehmus, *Evolution of Legislation Affecting Collective Bargaining in the Railroad and Airline Industries*, The Railway Labor Act at Fifty 9-14 (1976). So what a union and a carrier might agree to as to representation is invalid if inconsistent with the democratic principles set out in RLA Section 2, Fourth, which principles of course the *NMB* is designed and empowered to effectuate.

"single carrier" or single "transportation system."[5] The outcome of such proceedings might result in the expansion of the FEIA's representative status (and its contract). Moreover, the FEIA could also ask the NMB to determine, probably by an election, whether the Ransome training personnel should be separately represented and, if so, by whom (if anyone).

Thus, utilization of the NMB's various procedures can provide a union in a position comparable to FEIA's position at Pan American World Airways a range of opportunities, each providing a mechanism (albeit an essentially democratic mechanism) by which a union might be able to extend the current effective reach of its representation. While the NMB could not sit as an adjustment board/arbitration panel and could not grant directly or precisely the relief IUFA has sought by its grievance, that is how Congress intended the NMB to function under the RLA. Under the RLA's statutory scheme as elucidated by most of the courts that have addressed the issue, it is *after* the NMB acts to define how, and by whom, groups of employees in an airline merger or acquisition situation are to be represented, that a union and a carrier, or their arbitrator, may establish or interpret contractual working conditions for them.

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[5] *See, e.g., Pan American World Airways*, 3 NMB 41 (1957) (NMB clarifies old certification of union as representative of Pan Am clericals, and determines that the certification covers clerical employees of Pan Am's subsequently created non-airline [Guided Missile Range] division), and *Chesapeake & Ohio R. Co.*, 4 NMB 215 (1962) (NMB interprets certification covering certain railroad employees not to cover comparable employees of a subsidiary of the railroad).

## CONCLUSION

For the reasons outlined above, the petition for a writ of certiorari should be denied.

April 30, 1990

Respectfully submitted,

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